No. 17-801

In the Supreme Court of the United States

IN RE UNITED STATES OF AMERICA, *et al.*,
Petitioners.

ON PETITION FOR A WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE STATES OF CALIFORNIA, MAINE, MARYLAND, AND MINNESOTA AND THE CITY OF SAN JOSE IN OPPOSITION

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December 13, 2017

QUESTION PRESENTED

Whether the federal defendants have established a clear and indisputable right to mandamus relief from this Court (i) barring the district court from ordering completion of the administrative record for plaintiffs' Administrative Procedure Act claims, (ii) resolving privilege objections that defendants have not yet properly raised in any court, or (iii) addressing similarly unripe discovery disputes relating to plaintiffs' non-APA claims.

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STATEMENT

1. Nearly 800,000 young people have received protection under the Deferred Action for Childhood Arrivals program. Stay Opp. 4; D.Ct. Dkt 1 at 8.[1] DACA grants a renewable two-year deferral, during which recipients are protected from removal and may apply for certain public and private benefits, including work authorization. *See* Pet. App. 48a-50a; D.Ct. Dkt 1 at 7-10.

From DACA's inception in June 2012 until September 5 of this year, federal authorities repeatedly defended the legality of the program. *See, e.g.*, Stay Opp. 5-6; D.Ct. Dkt. 64-1 at 21 n.8 (2014 OLC memorandum); *cf.* D.Ct. Dkt. 64-1 at 230 (preserving DACA when other immigration policies were rescinded in February 2017). In 2015, the Fifth Circuit upheld a preliminary injunction secured by Texas and other States against a separate policy, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), on Administrative Procedure Act and statutory grounds, and in 2016 this Court affirmed that judgment by an equally divided Court. *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam), *aff'g Texas v. United States*, 809 F.3d 134, 146 (2015).

In June 2017, attorneys general from Texas and nine other States threatened to add a challenge to DACA to their still-pending DAPA litigation unless the Department of Homeland Security (DHS) moved to terminate the program by September 5. D.Ct. Dkt. 64-1 at 238-239. Subsequently, the President made clear that any decision to terminate the program would be "a decision that I make, and it's a decision that's very very hard to make." Stay Opp. 7 & n.3.

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[1] Citations to the district court docket are to N.D. Cal. Case No. 17-cv-5211.

On September 4, Attorney General Sessions sent Acting DHS Secretary Elaine Duke a one-page letter advising that DACA was "an unconstitutional exercise of authority by the Executive Branch." D.Ct. Dkt. 64-1 at 251. He summarily asserted that DACA "has the same legal and constitutional defects" as DAPA, and that "potentially imminent litigation" would "likely" result in its being enjoined. *Ibid.*

On September 5, the Attorney General (not Acting Secretary Duke) announced DACA's termination. *See* D.Ct. Dkt. 1-3 at 2. In addition to reiterating the Administration's new legal position, he suggested a number of policy reasons for the decision: in his view, DACA had "contributed to a surge of unaccompanied minors" at the border and "denied jobs to hundreds of thousands of Americans," and rescinding it would "make us safer" and "further economically the lives of millions who are struggling." *Id.* at 2-3.

The same day, Acting Secretary Duke formally rescinded DACA, citing only the appellate rulings in the DAPA litigation and the Attorney General's letter. *See* Pet. App. 67a. She instructed DHS to stop accepting DACA applications, and to accept renewal applications for a brief period only from individuals whose deferred action would expire on or before March 5, 2018. *See id.* at 67a-68a. Those whose protection would expire after March 5 could not renew. *See ibid.* Later that day, President Trump announced that "Congress now has 6 months to legalize DACA . . . If they can't, I will revisit this issue!" D.Ct. Dkt. 1 at 11.

2. The plaintiffs in these five actions allege that defendants' rescission of DACA violated the Administrative Procedure Act, the Fifth Amendment, and

other laws.[2] They contend in part that the termination decision was arbitrary and capricious because defendants reversed existing policy without sound justification and without adequately addressing the consequences for DACA grantees. *See, e.g.*, D.Ct. Dkt. 111 at 15-31.

Recognizing that thousands of young people would begin to lose DACA status starting March 5, the district court sought to manage the cases so final judgment and appellate review could be completed before then. C.A. Dkt. 13 at 59 (transcript). Defendants indicated they could produce the administrative record by October 6. *See id.* at 69-70. The court made clear that it expected a full record, and that defendants should not "put[] in there what helps them and . . . leave out what hurts them." *Ibid.*

On October 6, defendants proffered an administrative record consisting of fourteen documents. All the documents were already publicly available, and 192 of the 256 pages consisted of court opinions in the DAPA litigation. Pet. App. 5a-6a; *see* D.Ct. Dkt. 64-1.

Plaintiffs moved for completion of the administrative record, production of a privilege log, and a ruling on certain privilege issues. *See* D.Ct. Dkt. 65. After briefing and argument, the district court partially granted the motion. *See* Pet. App. 42a-44a. It recognized that APA review is to be "based on 'the whole record,'" ensuring that an agency is not "'withholding evidence unfavorable to its position.'" *Id.* at 29a.

The record proffered by an agency is presumed complete; but that presumption may be rebutted "by clear evidence[] that the agency relied on materials not already included in the record." Pet. App. 29a-30a.

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[2] *See* N.D. Cal. Case Nos. 17-cv-5211, 17-cv-5235, 17-cv-5329, 17-cv-5380, and 17-cv-5813.

Here, the court found that plaintiffs had rebutted the presumption. The proffered record did not contain "a single document from . . . [Acting] Secretary Dukes' subordinates" or advisers from other parts of the government; "any materials analyzing the [threatened] lawsuit or other factors militating in favor of and against the switch in policy"; any documents regarding the agency's February 2017 decision to retain DACA; or even news articles that defendants conceded the Acting Secretary had personally reviewed. *Id.* at 34a-35a; *see id.* at 31a-37a.

The district court directed defendants to complete the record with all materials "directly or indirectly considered in the final agency decision to rescind DACA," within specified limits. Pet. App. 42a. In particular, it ordered the inclusion of (non-privileged) documents in the following categories: materials actually seen or considered by the Acting Secretary; materials considered by persons, at DHS or elsewhere in the government, who then provided written or oral input directly to the Acting Secretary; comments or questions from the Acting Secretary herself, and the responses; and materials considered by the former Secretary when he decided, in February 2017, *not* to rescind DACA. *See id* at 42a-43a.

The court confirmed that privileged documents need not be included in the filed record (Pet. App. 43a); they were instead to be noted on a privilege log and submitted for *in camera* review (*see id.* at 40a-43a). Regarding 84 documents that defendants asserted were privileged and had previously submitted for review, the court agreed that 49 were privileged, but ruled that 35 should be included in the record in whole or in part. *See id.* at 43a; D.Ct. Dkt. 71-2 (privilege log). Those documents included media commentary regarding DACA that "government counsel admitted

. . . the Acting Secretary had seen." Pet. App. 36a. Under the particular circumstances of this case, the district court also found that defendants had waived attorney-client privilege for documents evaluating DACA's legality. *See id.* at 37a-39a.

Concurrently with these proceedings on the administrative record, plaintiffs sought discovery on their *non-APA* claims. While the district court generally permitted that discovery to proceed and the parties have pursued some disputes with a magistrate judge, no motion to compel or for a protective order has been presented to the court. As noted below, all discovery is currently subject to a stay entered by the district court. Pet. App. 45a-46a.

3. The court of appeals denied defendants' petition for a writ of mandamus barring completion of the administrative record. Pet. App. 1a-15a. Applying the stringent standard for such relief, it held that "the district court did not clearly err by ordering . . . completion." *Id.* at 3a.

The court of appeals first found no clear error in the conclusion that the presumption of completeness had been rebutted. Pet. App. 6a-8a. Among other factors, it reasoned that "the notion that the head of a United States agency would decide to terminate a program giving legal protections to roughly 800,000 people based solely on 256 pages of publicly available documents is not credible, as the district court concluded." *Id.* at 6a-7a (footnote omitted). It also explained that the record "consists of all materials '*considered by* agency decision-makers,' not just those which support or form the basis for the agency's ultimate decision." *Id.* at 8a (citation omitted). The court further reasoned that the district court's decision to include "materials considered by subordinates who then briefed the Acting Secretary" was "consistent

with the rulings of other district courts, comport[ed] with the Department of Justice's guidance on administrative records, and [was] not foreclosed by Ninth Circuit authority," and thus "was not clear legal error." *Id.* at 9a, 11a. Likewise, requiring inclusion of materials underlying the earlier decision to retain DACA was not clear error where "both decisions were part of an ongoing decision-making process." *Id.* at 11a-12a.

The court of appeals was "[]mindful of . . . separation-of-powers concerns," but disagreed that *Cheney v. U.S. District Court*, 542 U.S. 367 (2004), barred "completion of the administrative record with any White House materials." Pet. App. 3a, 12a. *Cheney* involved "'overbroad'" discovery requests, not "an administrative agency's [statutory] obligation . . . to provide the court with the record underlying its decision-making"; it imposed no "categorical bar against requiring DHS to either include White House documents in a properly-defined administrative record or assert privilege individually as to those documents." *Id.* at 12a-13a. Here, moreover, there was "no indication that either [the President's] documents or those of the Vice President would fall within the completed administrative record." *Id.* at 13a.

The court also rejected the argument "that it was clear legal error to require a privilege log and to evaluate documents allegedly protected by the deliberative process privilege on an individual basis." Pet. App. 13a. It noted that many district courts had "required a privilege log and *in camera* analysis of assertedly deliberative materials in APA cases," and the absence of circuit precedent weighed strongly against a finding of clear error. *Id.* at 14a. As to particular privilege determinations, defendants had "provided little . . . argument regarding the specific

documents ordered disclosed by the district court," leaving the court "unable to conclude . . . that the district court's privilege analysis was clearly erroneous." *Id.* at 12a n.8.

Judge Watford dissented. Pet. App. 16a-20a. He agreed that rescinding DACA would "profoundly disrupt the lives of hundreds of thousands of people, and a policy shift of that magnitude presumably would not have been made without extensive study and analysis beforehand." *Id.* at 16a. But he agreed with defendants that an agency generally may choose what it submits to support a decision, that "pre-decisional materials" are "ordinarily not part of the administrative record," and that plaintiffs had not established the basis for any exception to these principles, at least "at this stage of the case." *Id.* at 16a-19a.

4. After the court of appeals denied mandamus, the district court directed defendants to complete the administrative record by November 22. D.Ct. Dkt. 188. On November 17, defendants asked the court of appeals to stay its mandamus denial while defendants sought review by this Court. C.A. Dkt. 36 at 9. On November 19, plaintiffs asked the *district* court to stay record completion, as well as the pending discovery on non-APA claims, until it ruled on the pending motions by defendants to dismiss and by plaintiffs for a preliminary injunction, since those rulings could clarify or moot certain issues. D.Ct. Dkt. 190 at 1-4. Defendants then asked the district for a stay pending proceedings in this Court. D.Ct. Dkt. 191 at 2.

On November 20, the district court moved the deadline for record completion (and stayed the non-APA discovery) until December 22, two days after the hearing on the pending motions. *See* Pet. App. 45a. It noted that defendants should continue to "locate and

compile the additional materials" to complete the record, "to have a realistic opportunity to reach a final decision on the merits before [DACA's] March 5 termination date." *Id.* at 45a-46a.

The court of appeals dismissed defendants' stay motion on November 21. C.A. Dkt. 42. On December 1, defendants filed the present petition and sought a stay from this Court. On December 8, this Court stayed the district court's orders pending disposition of the petition, "to the extent they require discovery and addition to the administrative record filed by" defendants.

ARGUMENT

The core requirements for a writ of mandamus from this Court are a clear and indisputable right to relief and a lack of any other adequate means to attain it. Here, the federal defendants' principal argument is that the administrative record in an APA proceeding is whatever an agency says it is—a court has no power to order the record completed, they say, even if there are clearly non-privileged materials the agency considered but has not provided. That novel position, which the Executive Branch only recently began aggressively advancing, is not "indisputably" correct. Indeed, it is indefensible.

Defendants also broadly challenge privilege rulings already made by the district court, and point to that court's intention to review additional materials if defendants claim they are privileged. They suggest a need for immediate relief from this Court because if disputed materials are disclosed "there will be no going back." Pet. 18. This Court has held that privilege issues ordinarily are adequately reviewed on appeal. This case is unusual, and if the Court is not confident that, in this instance, ordinary mechanisms will suffice to protect legitimate privilege interests, it

might direct the lower courts to ensure that no contested material is made public without a full opportunity for litigation and review. This Court, however, has no record or argument before it that would allow it to address defendants' document-specific claims in the first instance, even if that were a desirable procedure.

Finally, defendants repeatedly allege that discovery on plaintiffs' non-APA claims will be unduly burdensome. Discovery disputes, too, are not ordinarily managed by mandamus, especially when (as here) they have never been presented to the lower courts. In any event, the district court has stayed all discovery until after it hears upcoming motions, and its rulings on those motions could substantially affect the need for or nature of any future review. In the meantime, there is no basis for mandamus relief from this Court.

I. DEFENDANTS HAVE NOT SATISFIED THE REQUIREMENTS FOR MANDAMUS RELIEF

To justify an extraordinary writ, petitioners "must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.1. Mandamus, in particular, is "a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney v. U.S. District Court*, 542 U.S. 367, 380 (2004). The federal defendants must show first that they have "no other adequate means to attain the relief" they seek, and second "that they have a "clear and indisputable" right to that relief. *Id.* at 380, 381. Even then, the Court "must be satisfied that the writ is appropriate under the circumstances." *Id.* at 381.

A. Defendants Have Other Adequate Means of Relief

Mandamus petitioners must show they have no other adequate means to attain relief "to ensure that the writ will not be used as a substitute for the regular appeals process." *Cheney*, 542 U.S. at 380-381. Here, defendants assert that "the district court's orders will be effectively unreviewable on appeal from final judgment." Pet. 18. That is incorrect.

Defendants' arguments relate principally to the scope and composition of the administrative record. Pet. 19-31. Those issues can be addressed on appeal—as demonstrated by leading decisions on the required contents of the record. *See, e.g., Bar MK Ranches v. Yuetter*, 994 F.2d 735, 737, 739 (10th Cir. 1993); *Dopico v. Goldschmidt*, 687 F.2d 644, 646, 654 (2d Cir. 1982). Here, an appellate court could decide if the district court erred in ordering defendants to complete the record and, if so, could consider only defendants' fourteen-document record in ruling on plaintiffs' APA claims. And as to specific privilege rulings, "postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of" privileges. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009).

Defendants contend that without immediate relief they will need to review "thousands of additional documents" in a compressed period. Pet. 18; Stay Reply 1. But the burden of having to produce a complete record is not a basis for extraordinary relief; and as to specific timing, defendants have never asked the lower courts for an accommodation tailored to any particular need. Rather, they have sought a complete exemption from the obligation to produce a proper administrative record. Defendants also argue (Pet. 18) that there will

be "no going back" if privileged materials are improperly made public; but they have never asked the lower courts to allow filing under seal or impose protective orders as to specific materials pending later appellate review of privilege disputes. For that matter, they have never given the lower courts the specific information or arguments necessary to support their assertions of privilege, including concerning White House documents. *See* Pet. App. 12a n.8. Like other litigants, the federal defendants must pursue all ordinary avenues for relief before seeking an extraordinary writ. *In re Shalala*, 996 F.2d 962, 965 (8th Cir. 1993) (denying mandamus where "the Secretary has other avenues to attain the relief she desires").[3]

This case is by necessity proceeding quickly, and may involve particularly sensitive issues of government confidentiality and privilege. If this Court believes that normal mechanisms might not be adequate to protect legitimate interests in this context, it could make clear to the lower courts that before orders having arguably irreversible consequences, such as public disclosure of contested materials, may take effect, defendants must be accorded a full, fair, and orderly opportunity to make their arguments for non-disclosure—first in the district court and then by petition or appeal. Apart from perhaps providing such procedural guidance for the lower courts, however, it would surely be both unrealistic and premature for this Court to seek to review specific administrative-record

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[3] As to the potential for resumed discovery on non-APA claims after the district court's current stay ends on December 22, in the ordinary course defendants could serve specific objections to plaintiffs' discovery requests; meet and confer with plaintiffs; pursue protective orders or resist motions to compel; and seek targeted mandamus relief as to any specific ruling they claim is clearly erroneous and exceptionally important.

or privilege issues at the present juncture, in the context of emergency writ proceedings.

B. Defendants Have No "Clear and Indisputable" Right to Relief

Defendants contend that the district court has violated "bedrock principles" of APA review. Pet. 5; *see id.* at 19-31. But the principles they espouse are not supported by the APA itself or by this Court's precedents, and conflict with longstanding practice of both lower courts and federal agencies (including, until very recently, the Department of Justice). The Executive Branch has recently adopted a new and aggressive view of the proper limits of an administrative record. But that view is far from clearly and indisputably correct, and it is not a proper basis for mandamus.

1. Scope of the administrative record

Defendants first contend that judicial review of federal agency action must be limited to the documents that an agency unilaterally selects for submission to the court. *See* Pet. 19-20, 23-24. They read this Court's decisions as limiting APA review to "'the record the agency presents to the reviewing court'" (Pet. 20 (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)))—which they interpret to mean whatever the agency chooses to present. They also appear to believe that courts are powerless to order an agency to complete the administrative record, even where it is apparent that the documents handpicked by the agency do not include all of the materials that were before the agency when it made its decision. *See* Pet. 20; *see also* Pet. App. 6a-7a, 31a-36a.[4]

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[4] Defendants now assert that the fourteen-document record they produced on October 6 includes "all non-deliberative materials

Defendants' position finds no support—let alone any clear or indisputable grounding—in the APA or this Court's cases. On the contrary, the APA directs that review of agency decisions "shall" be conducted based on "the whole record." 5 U.S.C. § 706. The "whole record" means "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

As Congress recognized, access to the whole record is essential to fair and effective judicial review under the APA. *See* 5 U.S.C. § 706.[5] In arbitrary-and-capricious review, for example, courts must consider in part whether an agency has explained its decision in a way that "runs counter to the evidence before [it]," or failed to offer a "'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Here, defendants argue that their decision, although deeply affecting 800,000 people, "was not based on any factual findings or particular evidentiary record." Stay Reply 1. But even when an agency has broad authority or can choose among different policy goals, its decisions must not be "arbitrary" or "capricious." 5 U.S.C. § 706(2)(A). And a court cannot

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. . . considered by the Acting Secretary in reaching her decision to rescind" DACA. Pet. 7. That is not what they told the lower courts. *See* Stay Opp. 24 n.10; Pet. App. 36a; C.A. Arg. Video 54:18-54:53, 57:02-57:44.

[5] *See* S. Rep. 752, 79th Cong., 1st Sess. 28 (1945) ("The requirement of review upon 'the whole record' means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case."); H.R. Rep. No. 1980, 79th Cong., 2nd Sess. 46 (1946) (same); *cf. Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477-490 (1951) (discussing history of APA "whole record" requirement in context of review of formal agency factfinding).

meaningfully apply that standard if it cannot tell what information the agency had before it when it made its choice.

Defendants quote selectively from *Florida Power* and *Camp v. Pitts*, 411 U.S. 138 (1973) (per curiam). *See* Pet. 20, 24. Those cases started from the premise that the agency had already satisfied its statutory obligation to produce the whole record. In *Florida Power*, the Court contemplated judicial review based on "the record before the agency." 470 U.S. at 744. In *Camp*, the Court observed that the "*entire* administrative record was placed before" the district court. 411 U.S. at 139 (emphasis added). Neither case held—or even suggested—that agencies have unreviewable discretion to pick and choose what to include in the record they present for review by the courts. *Camp* and *Florida Power* stand only for the proposition that when an agency action cannot be sustained based on the *whole* record that was before the agency, the proper remedy is "to remand to the agency for additional investigation or explanation"—not "to conduct a *de novo* inquiry into the matter being reviewed" and create a *new* record in the district court. *Florida Power*, 470 U.S. at 744; *see Camp*, 411 U.S. at 142.

Defendants identify no lower-court authority supporting their position. *See* Pet. 19-26. On the contrary, lower courts recognize that an "agency may not unilaterally determine what constitutes the Administrative Record," and require that APA review be conducted based on the entire record that was before the agency. *Bar MK Ranches*, 994 F.2d at 739 ("The complete administrative record consists of all documents and materials directly or indirectly considered by the agency."); *see, e.g.*, *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989); *Amfac Resorts, LLC v. U.S. Dep't of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C.

2001). Where there is good reason to believe the whole record has not been produced, courts across the Nation order that it be completed.[6]

Defendants argue that a court may order inclusion of additional documents "only" based on a showing of bad faith or improper behavior. Pet. 20, 26. That argument conflates two different concepts. Although courts and commentators sometimes use similar terms imprecisely, there is a difference between *supplementing* an administrative record and ordering an agency to *complete* the record it has proffered for review. A court may supplement even a facially complete record, including through discovery or depositions, based on "a strong showing of bad faith or improper behavior." *Overton Park*, 401 U.S. at 420. That showing is not necessary, however, to order an agency to complete the record where "it appears the agency has relied on documents or materials not included in the [originally filed] record." *Pub. Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982) (Kennedy, J.).

The principle that courts may order completion of an incomplete administrative record is an "explication of the rule that judicial review is based upon the full administrative record in existence at the time of the agency decision." *Pub. Power*, 674 F.2d at 794. As the Administrative Conference of the United States has recognized, "completion may be appropriate" where, as here, "the presumption of regularity has been rebutted" because "there are credible allegations that

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[6] *See, e.g., Charleston Area Med. Ctr. v. Burwell*, 216 F. Supp. 3d 18, 24-25 (D.D.C. 2016); *Water Supply & Storage Co. v. U.S. Dep't of Agric.*, 910 F. Supp. 2d 1261, 1269 (D. Colo. 2012); *Miami Nation of Indians of Indiana v. Babbitt*, 979 F. Supp. 771, 777 (N.D. Ind. 1996).

the administrative record" the agency proffered "for judicial review is incomplete." *See* ACUS Recommendation 2013-4: The Administrative Record in Informal Rulemaking 11-12 (adopted June 14, 2013).[7]

Defendants' argument also conflicts with the longstanding practice of federal agencies, including the Department of Justice. Until very recently, DOJ guidance had followed established precedent by instructing federal agencies that "[t]he administrative record consists of all documents and materials directly or indirectly considered by the agency decision maker in making the challenged decision." U.S. Dep't of Justice, Env't and Nat. Res. Div., Guidance to Federal Agencies on Compiling the Administrative Record 1-2 (Jan. 1999) (DOJ Guidance).[8] DOJ advised that the record "is not limited to documents and materials relevant only to the merits of the agency's decision," and "includes documents and materials relevant to the process of making the agency's decision," regardless of "whether they support or do not support the final agency decision" or were "specifically considered by the final agency decision-maker." *Id.* at 2.

On the very day that it filed its mandamus petition in the court of appeals in this case, DOJ instructed other agencies to "disregard[]" that longstanding guidance. Pet. App. 10a-11a; C.A. Dkt. 15 at 28.[9] Defendants now characterize the revoked guidance as merely

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[7] *Available at* https://www.acus.gov/sites/default/files/documents/Administrative%20Record%20_%20Final%20Recommendation%20_%20Approved_0.pdf.

[8] *Available at* http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf.

[9] In revoking its prior guidance, DOJ noted that the guidance was contrary to positions it had taken in another mandamus petition, *In re Thomas E. Price*, Ninth Circuit No. 17-71121. *See* C.A. Dkt.

"suggest[ing]" that agencies should take a "cautious approach" by "includ[ing] more than the law requires in the record." Stay Reply 6 n.2; *see* Pet. 24-25 & n.5. But the guidance correctly stated what longstanding appellate precedent requires. *Compare* DOJ Guidance 1-2, *with Thompson*, 885 F.2d at 555. DOJ is free to argue that it was wrong then and is right now. But its own adherence to a different and more reasonable position until less than two months ago is powerful evidence that the district court's adherence to that position was not clear and indisputable error.

Moreover, if defendants' new position became the law, it would profoundly interfere with the ability of courts to review agency decisions. For a court "to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984). The APA thus "requires review of 'the whole record,'" because a review of "less than the full administrative record might allow a party to withhold evidence unfavorable to its case." *Ibid.* Giving a federal agency unfettered discretion to decide the contents of the administrative record would allow it to "skew the 'record' for review in its favor by excluding from that 'record' information in its own files which has great pertinence to the proceeding in question." *Envtl. Def. Fund, Inc. v. Blum*, 458 F. Supp. 650, 661 (D.D.C. 1978). That would hamstring judicial review by forcing it to proceed based on "a fictional account of the actual decisionmaking process." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977).

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15 at 28. That pending petition seeks mandamus regarding a district court order requiring an agency to complete the record with certain pre-decisional materials and provide a privilege log for withheld documents. It was filed on April 19, 2017.

Defendants suggest that they are relieved of their obligation to produce a complete record here "in light of the nature of" the agency decision. Pet. 20. They note that the APA defines the record of formal administrative proceedings, but "does not contain a parallel provision prescribing the contents of the administrative record for informal agency actions" like the one at issue here. Pet. 28 (discussing 5 U.S.C. § 556(e)). That, however, is no reason the agency should simply be able to choose "what belongs in the record it compiles." Pet. 29. To the contrary, the absence of specific guidelines is a reason for courts to be even more vigilant in policing the general statutory requirement that agencies produce the "whole record." 5 U.S.C. § 706.

Finally, defendants fare no better in arguing that they are excused from producing any "factual or evidentiary record" because, they say, terminating DACA was a "policy determination" based on concerns about threatened litigation. Pet. 20, 21. Congress has required review to be based on the whole record before the agency, regardless of the proffered reason for the agency's decision. *See* Pet. App. 8a. Whether the "litigation risk" rationale proffered here is arbitrary and capricious cannot be evaluated without consulting the whole record that was before the agency. Among other things, any rational assessment of how to respond to litigation risk would balance that threat against the costs to be inflicted on the government and the economy by abandoning a policy that allowed hundreds of thousands of residents to obtain work authorization and other benefits. A court cannot properly evaluate the termination decision, even deferentially, without knowing what factual information was before the agency regarding those costs. *See generally State Farm*, 463 U.S. at 42 (arbitrary-and-capricious review considers whether agency decision "is rational" and was "based on consideration of the relevant factors");

cf. Pet. App. 8a, 35a. Yet the administrative record proffered by defendants includes not a single document addressing such obvious "policy" aspects of defendants' decision.

2. Exclusion of "deliberative" documents from the record

Defendants next contend that an agency may unilaterally exclude any pre-decisional document it deems to be "deliberative" from the administrative record it proffers to a reviewing court, without affording plaintiffs or the courts any opportunity to understand or challenge those exclusions. *See* Pet. 27-31. Defendants characterize this argument as a "fundamental principle[]" of judicial review (*id.* at 19), and as one that "*this Court*" has adopted (*id.* at 30). But they cite no precedent from this Court actually supporting it—let alone establishing it as clearly and indisputably correct.

Instead, defendants invoke decisions reflecting the settled rule that courts reviewing administrative-law claims generally should not "probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required." *Morgan v. United States*, 304 U.S. 1, 18 (1938) (*Morgan I*); *see* Pet. 27. The *Morgan* line of cases involved formal agency adjudications, in which the government had produced administrative records comprising thousands of pages of documents that were before the agency. *See Morgan I*, 304 U.S. at 16; *United States v. Morgan*, 313 U.S. 409, 417, 422 (1941) (*Morgan II*). In that context, the Court observed that it was inappropriate to depose the Secretary regarding administrative-law claims, *see Morgan II*, 313 U.S. at 422, or to probe the Secretary's "mental processes" in making a decision, *Morgan I*, 304 U.S. at 18; *but see Overton*

Park, 401 U.S. at 420 (courts "may require the administrative officials who participated in [a] decision to give testimony" based on "a strong showing of bad faith or improper behavior"). Neither those cases nor other decisions of this Court hold that an agency may exclude all "pre-decisional documents" (*e.g.*, Pet. I) from the record it proffers for review based solely on its own unilateral determination that all such documents are subject to the deliberative process privilege.

On the contrary, such documents routinely appear in administrative records produced by federal agencies and reviewed by courts. *See, e.g.*, *Epsilon Elecs., Inc. v. U.S. Dep't of the Treasury*, 857 F.3d 913, 928 (D.C. Cir. 2017) (pre-decisional memorandum analyzing evidence before the agency). And before changing its mind partway through this litigation, DOJ itself advised federal agencies that records supporting informal agency action should include emails, notes, draft documents circulated for comment, minutes or transcripts of meetings, decision documents, and other pre-decisional materials. DOJ Guidance 3-4; *see also id.* at 4 (agencies should prepare log for documents withheld on privilege grounds).

The inclusion of pre-decisional information is essential to the fair and effective review of agency action. Courts conducting APA review necessarily must assess whether an agency's decision is objectively valid by considering the materials that were before the agency at the time it made its decision. Those materials are, by definition, "pre-decisional." Depriving courts of all such materials would make it impossible for them to determine, for example, whether an agency explained its decision in a way that "runs counter to the evidence before" it. *State Farm*, 463 U.S. at 43.

Of course, certain materials will be protected from public disclosure under the deliberative process privilege or otherwise. *Cf.* Stay Reply 7 (discussing materials analogous to "a law clerk's bench memorandum"). The district court here acknowledged as much by directing that defendants could withhold material from the publicly filed record "based on deliberative-process, or any other privilege." Pet. App. 43a. It simply required that they log the document, assert any claimed privilege, and make the document available for *in camera* review by the court. *Ibid.*

But defendants are quite wrong to suggest that *every* pre-decisional agency document not otherwise public is automatically excludable, without any obligation on the agency to identify the exclusion or assert a specific basis for it. That position ignores the requirements for successful assertion of the deliberative process privilege. First, the document must truly be "deliberative." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). That is, the document must "reflect advisory opinions, recommendations and deliberations comprising" the process leading to a government decision. *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). The privilege does not protect "material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *In re Sealed Case*, 121 F.3d at 737. Second, the "deliberative process privilege is a qualified privilege and can be overcome by a sufficient showing of need"—a determination courts must make "on a case-by-case, ad hoc basis." *Ibid.*; *see Warner Commc'ns Inc.*, 742 F.2d at 1161.

Defendants' position would convert the deliberative process privilege from a qualified, common-law

privilege to a categorical exclusion from the statutory requirement to produce the "whole record." 5 U.S.C. § 706. It would make an agency the sole arbiter of whether its own document is privileged, and deprive courts of any opportunity to test whether a document is truly deliberative or to decide whether the privilege has been overcome.

Finally, defendants contend that D.C. Circuit precedent supports their arguments about "deliberative" documents. *See* Pet. 27-28 & n.6. Even if that were correct, it would not establish that a district court in a different circuit clearly erred by following a contrary approach, or that defendants have any clear and indisputable right to relief from this Court. But defendants substantially over-read the cited cases, which involved formal adjudications before multi-member agencies. In that context, the D.C. Circuit has rejected efforts to disclose the contents of "secret . . . deliberations" between agency members, likening such disclosure to scrutiny of "judicial deliberations." *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994) (opinion of Randolph, J.). In *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Commission*, 789 F.2d 26 (D.C. Cir. 1986), for example, the court refused to supplement the administrative record with transcripts of private and pre-decisional deliberations between the members of a multi-member commission. *Id.* at 44-45; *see also Kansas State Network, Inc. v. FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983) (transcript of "actual deliberations" of the FCC in challenge to decision made during formal adjudication).[10] At most, those cases support a rule that actual deliberations of multi-member agencies

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[10] The remaining D.C. Circuit case cited by defendants, *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1279-1280 (D.C. Cir. 1998), did not involve APA review of agency action.

during formal adjudications may be excluded from the administrative record because they could reveal the "collective mental processes of the agency." *San Luis Obispo*, 789 F.2d at 44. The cases do not support defendants' apparent position that an agency headed by a single decision-maker may exclude from the record any or all pre-decisional documents that were part of an informal decision-making process.[11]

3. Privilege rulings

Defendants also seek mandamus regarding privilege rulings by the district court, including its conclusions that privileges either do not apply or have been overcome with respect to certain documents the court already reviewed *in camera*. *See* Pet. 31-33. But appellate courts are properly reluctant to use mandamus to address pretrial privilege disputes, since doing so would invite endless "'piecemeal appellate litigation.'" *In re Shalala*, 996 F.2d at 964.

Defendants fault the district court for "summarily dismissing" privilege claims with respect to 84 documents collected from the Acting Secretary's office. Pet. 31. But the district court reviewed each of those documents *in camera*, agreed with defendants that 49 should be wholly excluded from the record, and agreed

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[11] Excluding from the record the private deliberations of multi-member agencies in formal adjudications does not frustrate judicial review, because the record on review includes the "transcript of testimony and exhibits, together with all papers and requests filed in the proceeding." 5 U.S.C. § 556(e); *see, e.g.*, *Checkosky*, 23 F.3d at 489 (opinion of Randolph, J.) (SEC record contained "3,800 pages of transcript and 350 exhibits"). That is, the court has before it the same "whole record" that the agency members were privately deliberating *about*. For informal decisions, however, defendants' proposed rule would allow agencies to exclude all but a handful of relevant documents from the record on review, as defendants did in this case.

that two others should be withheld in part. Pet. App. 43a. The court made these rulings on an expedited basis, without briefing or argument (*see* Pet. 31); but defendants do not explain why, if they have specific arguments to make about those documents, they have not made them to the lower courts in the eight weeks since the initial ruling. They could have, for example, made the assertions and factual showings essential to certain privilege claims. *See, e.g.*, *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000). Instead, they have offered only general and sweeping arguments in appellate filings.

As noted above, if this Court is concerned that arguably privileged material might be publicly disclosed before defendants had a fair opportunity to present their arguments or obtain review, it could direct the lower courts to ensure that does not happen. For example, the courts could use sealed filings, protective orders, and similar mechanisms. But defendants certainly have not provided this Court (or the court of appeals) with any basis for holding that individual privilege rulings made by the district court—about documents that only defendants and the district court have seen—are clearly and indisputably wrong. *See* Pet. App. 12a n.8 (defendants "provided little in the way of argument regarding the specific documents ordered disclosed by the district court").

Defendants' privilege arguments about White House documents suffer from a similar shortcoming. Their petition is punctuated with concerns about the possibility that documents originating from the White House complex might be part of the administrative record. *See* Pet. 17-18, 22, 25-26, 30-32. Nowhere, however, do they carry their burden of showing that they are clearly and indisputably entitled to relief

from any particular ruling of the district court regarding such documents.

Defendants asserted "executive privilege" with respect to seven documents reviewed *in camera* by the district court, three of which the court agreed should be excluded from the record. *See* D.Ct. Dkt. 71-2; Pet. App. 43a. None of those documents was found at the White House. Rather, they were "[p]hysically in the acting Secretary's office." C.A. Dkt. 13 at 167. There is no support for a conclusion that any document originating from the White House, which was received and reviewed by the agency decision-maker, is categorically exempt from an administrative record. Nor have defendants established that the district court clearly erred in holding that the four documents it ordered included in the record did not meet the criteria for protection under the presidential communications privilege. *See generally Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1114 (D.C. Cir. 2004). Indeed, defendants do not even address three of the documents in their petition. They do assert (for the first time in this Court) that the fourth document is a "*memorandum from the White House Counsel to the President.*" Pet. 32. If that is true, then it may well be privileged. But defendants never made that argument below, and did not even include information about the drafter or intended recipient of the document in their privilege log. *See* Dkt. 71-2 at 2 (privilege log entry for DACA_RLIT00000069).

As to the documents of White House staff who directly advised the Acting Secretary, defendants again fail to present the courts with the factual information needed to support their arguments. They repeatedly invoke *Cheney* (Pet. 17 n.2, 18, 22, 26, 30, 32, 33), treating that decision as if it categorically

frees the Executive Branch from having to collect documents from the White House complex for purposes of judicial review. But *Cheney* involved "overly broad discovery requests" directed at the Vice President and other members of an internal White House working group established "to give advice and make policy recommendations to the President." 542 U.S. at 372, 386. The Court in *Cheney* was given a concrete understanding of the burden that would result from those requests. Under the circumstances, it held that the Executive Branch should not be required to "winnow the discovery orders by asserting specific claims of privilege and making particular objections." *Id.* at 389.

Here, no one can conduct the type of balancing analysis contemplated by *Cheney*, *see* 542 U.S. at 385, without further information from defendants about the burdens they argue will result from the district court's order directing them to complete the record. Defendants have presented the lower courts with no information about the number of staff or the volume of documents at the White House complex implicated by that order. Nonetheless, the district court was mindful of the need to avoid any undue burden. It required inclusion in the administrative record only of DACA-related documents considered by those White House staff who then directly communicated advice, direction, or other "input" to the Acting Secretary concerning termination of DACA. And it underscored that defendants were under no obligation to "scour the . . . White House for documents for inclusion." Pet. App. 43a-44a. If, based on information about this decision-making process that was not available to the district court (or plaintiffs), defendants believed that such a requirement would burden the White House in a manner akin to the discovery requests in *Cheney*, they could and should have presented that information to

the courts below. *Cf. Cheney*, 542 U.S. at 388-389 (noting that the government squarely presented its arguments about burden to the district court.) Indeed, they can still do that. They should not, however, be granted extraordinary mandamus relief by this Court based on vague and unsupported assertions about the burdens of compliance, or on information never presented to the courts below. *See* Pet. 26 (suggesting, for the first time, that the President and Vice President's documents fall within the scope of the order).

Finally, defendants attack the district court's ruling that they waived the attorney-client privilege regarding certain communications with or within the Department of Justice bearing "on whether or not DACA was an unlawful exercise of executive power and therefore should be rescinded." Pet. App. 39a; *see* Pet. 32. But they mischaracterize the nature of that ruling. The district court did not hold "that an agency waives its attorney-client privilege on a categorical basis simply by weighing legal risks or announcing a particular view of the law." Stay Appl. 25; *see* Pet. 32. Indeed, it flatly rejected that overbroad characterization. *See* Pet. App. 38a. The court based its ruling on the particular circumstances of this case. Defendants terminated a longstanding policy they had previously repeatedly defended as legally valid; the sole proffered explanation was an about-face by the Attorney General regarding the legality of that policy (Pet. App. 67a); and defendants disclosed the Attorney General's one-page conclusion (D.Ct. Dkt. 64-1 at 251), but not any significant explanation or analysis of the change. Under those unusual circumstances, the district court found a limited waiver based on the settled principle that a litigant may not use the attorney-client privilege as both a sword and a shield. Pet. App. 37a. Defendants have not established any clear and indisputable right to relief from that ruling.

4. Discovery on non-APA claims

Defendants also argue that the district court clearly and indisputably erred by "authorizing intrusive discovery" on plaintiffs' non-APA claims. Pet. 19. To the extent this argument refers to the case management order of September 22 authorizing a limited number of "narrowly directed" discovery requests (Pet. App. 22a), the argument is waived and will soon be moot.

Defendants suggest that the district court should not have authorized any discovery without first considering their arguments "concerning the district court's jurisdiction and the reviewability of DHS's decision." Pet. I. But after learning that the district court was inclined to permit some focused discovery because of the exigencies of this case, defendants opted *not* to file a prompt motion to dismiss that the district court could have ruled on before discovery responses were due. *See* C.A. Dkt. 13 at 74-75. And instead of presenting the district court with legal arguments about why discovery was categorically inappropriate, they participated in discovery, making six witnesses available for depositions. *See* Pet. 12.

In any event, even before this Court issued its recent stay, the district court had stayed all discovery until at least December 22. On December 20, the district court will hear argument on the motion to dismiss that defendants eventually filed (six weeks after the case management conference). If the court rejects defendants' jurisdiction and reviewability arguments, that will address their concern about discovery proceeding before any ruling on those issues. If it grants the motion in whole or in part, that could reduce or eliminate defendants' obligation to respond to the stayed discovery. Either way, defendants' concerns

about the now-stayed order authorizing discovery provide no basis for mandamus relief.

Nor do defendants' arguments about specific discovery issues warrant relief from this Court. Again, defendants have not yet presented any such issues to the district court and it has not yet ruled on them. Defendants contend that the court "allowed broad discovery into the subjective motivations of the Acting Secretary and those who advised her, including White House officials." Pet. 6. But to the extent that argument is intended to conflate *non-APA* discovery that was authorized by the case management order with the separate order requiring defendants to complete the administrative record, the Court should recognize that the two issues are quite distinct. And to the extent defendants are challenging the scope of the non-APA discovery, they have never raised a single discovery issue with the district court. For example, they argue about the burden of responding to written discovery requests (Pet. 11-12), and offer detailed theories about why such discovery is inappropriate under the circumstances of this case (*id.* at 23). But they have not served objections or responses to those requests—let alone sought a protective order from the district court or resisted a motion to compel. There is no basis for this Court to grant a writ of mandamus "directly to the district court" (Pet. 17) regarding issues on which the district court has never ruled, or even been asked to rule. *See* Pet. App. 2a-3a n.1 ("[i]ssues regarding . . . the propriety of discovery on the non-APA claims, including the propriety of depositions, are not properly before us at this time").

C. Mandamus Is Inappropriate Under the Circumstances of This Case

The last consideration governing mandamus relief is whether "the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 381. Here, the federal government abruptly decided to terminate a longstanding policy affecting hundreds of thousands of young people and to set an arbitrary March 5, 2018 deadline for those individuals to begin losing their protection and work authorization. The district court is doing its best to fairly adjudicate claims as to the legality of that decision before the government's deadline. Defendants now take the position that there is no need for the courts to rule on plaintiffs' claims before that deadline, explaining that March 5 "does not mark a watershed of expirations," since "some recipients" have deferred action that will not expire until 2020. Stay Reply 15 & n.6. At the outset of this litigation, however, they told the district court: "we think your suggestion to get to final judgment quickly makes a lot of sense in this case." C.A. Dkt. 13 at 70. And they agreed to produce the administrative record—the "whole record" (5 U.S.C. § 706)—in early October, before dispositive motions were filed. C.A. Dkt. 13 at 69.

Instead of making good on that commitment, defendants produced a record of fourteen hand-picked documents. They have spent the last nine weeks fighting at every level of the federal court system to avoid disclosing to the courts, and ultimately the public, the full record of materials that were before the agency when it made this momentous decision. They now acknowledge that they have collected those materials, and could complete their review and produce the

whole record in short order.[12] Of course, the States agree that any process for evaluating good-faith claims of privilege should proceed in a way that, while expeditious, is orderly and fair to all sides. But defendants have not provided a sufficient basis for this Court to grant a writ of mandamus relieving them entirely from their statutory obligation to produce the "whole record" of their DACA termination decision for appropriate judicial review.

II. CERTIORARI IS NOT WARRANTED

Defendants likewise identify no compelling basis for their alternative suggestion that the Court grant certiorari and review the court of appeals' denial of mandamus. *See* Pet. 17, 34. They do not seriously allege any actual conflict between the courts of appeals that is implicated by the petition. While the underlying subject matter of this case is undoubtedly of great importance, defendants have not established that the issues concerning the administrative record raised in the current petition warrant review by this Court.

Even if the Court were inclined to take up some or all of those questions at some point, this is not the appropriate time. This interlocutory petition presents an exceptionally poor vehicle for review because it arises from the court of appeals' denial of a mandamus petition. This Court would thus review the presented questions through the lens of the deferential mandamus standard, rather than de novo. Meanwhile,

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[12] Defendants have located 6,895 agency documents that potentially fall within the administrative record, as informed by the district court's October 17 order. *See* Appl. Add. 23, 36. A team of 10 attorneys each reviewing 100 documents a day could complete that review in a week. Defendants claim to have the assistance of scores of agency attorneys. *See, e.g.*, Appl. Add. 32 ("more than 40 DOJ attorneys").

developments in the ongoing proceedings below, such as the district court's rulings on the pending motions to dismiss and for a preliminary injunction, could substantially affect the need for, or the context of, review. In addition, any specific questions of privilege are almost totally undeveloped and would more appropriately be reviewed after they are presented to and considered by the lower courts. There is no sound basis for review at this time.

CONCLUSION

The petition for a writ of mandamus or certiorari should be denied.

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December 13, 2017

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